AHMAD HOP

v.

PUBLIC PROSECUTOR

HIGH COURT BORNEO
CHONG SIEW FAI J
[CRIMINAL APPEAL NO. KG. 41 OF 1991]
16 MARCH 1992

CRIMINAL PROCEDURE: *Sentencing - Whether sentences manifestly excessive - Recovery of retained or stolen items - When fines should be imposed - Sentencing where charges arose out of same set of facts and transaction - Whether maximum sentences appropriate - General guidelines for sentencing.*

The appellant (A) was sentenced in the Magistrates Court for the following 3 cases:

(1) Dishonestly retaining stolen property, a 14" TV set valued at about RM500, under s. 411 of the Penal Code - sentenced to 5 years imprisonment and fined RM3,000 in default 6 months imprisonment.

(2) Dishonestly retaining stolen property, a 20" TV set valued at about RM1,200 under s. 411 of the Penal Code - sentenced to 5 years imprisonment and fined RM5000 in default 6 months imprisonment.

(3) Theft of a TV set, video player and a CD Mini Compo, a total value of about RM3,280 under s. 380 of the Penal Code - sentenced to 6 years imprisonment and 5 strokes of rotan.

A appealed against the sentences on the ground that it was manifestly excessive.

Held:

[1] As the offences in cases 1 and 2 were committed at the same time, place and transaction although the property involved belonged to different owners, it is manifestly excessive to impose substantial penalties on both charges. Under such circumstances only one substantial sentence should be meted out for one charge while a lesser sentence should be given to the other.

[2] The imprisonment term of 5 years in cases 1 and 2 is the maximum under s. 411 of the Penal Code. Maximum penalty should only be meted out for the worst possible cases for which the case under appeal does not merit under the circumstances.

[3] Fines may be added to other forms of punishment in cases where offenders obtained profits so as to deprive them of the ill-gotten benefit. As A was sentenced to substantial periods of imprisonment and had obtained no financial benefit from the offences as the retained or stolen items were recovered, the fines imposed were inappropriate and are set aside.

[4] For case 3, since there is no evidence of any use of actual physical violence the sentence of whipping is set aside although the sentence of 6 years imprisonment is to stand.

[5] The sentences are thus reduced accordingly for the 3 cases:

1. Imprisonment reduced to 3 years and the fine of RM3,000 is set aside.
2. Imprisonment reduced to 3 months and the fine of RM5,000 is set aside.
3. Imprisonment of 6 years to stand but order for whipping set aside.

[Sentences reduced accordingly.]

Cases referred to:
R. v. Forsythe [1980] 2 Cr App R (S) 15 ***(foll)***
R. v. Jacobs [1980] Crim LR 800 ***(foll)***
DPP v. Stewart [1983] 2 AC 91 PC ***(foll)***

Legislation referred to:
Criminal Procedure Code, s. 171A
Penal Code, ss. 380, 411

For the appellant - Unrepresented
For the respondent - Thomas Akin; DPP

JUDGMENT

Chong Siew Fai J:

This appeal relates to 3 cases in the Magistrate's Court, that is :

(1) Case No. M/CR/338/91/A;

(2) Case No. M/CR/340/91/C; and

(3) Case No. M/CR/616/90/C.

The appeal is against the sentences imposed on the ground that they are manifestly excessive.

Before dealing with the appeal, I would make an observation. According to the record of proceedings of the lower Court, there were 7 other cases involving offences to which the appellant pleaded guilty and respecting which the prosecuting officers, by citing s. 171A of the Criminal Procedure Code, seemed to have intended them to be taken into consideration for sentencing. In his judgment, however, the learned trial Magistrate ordered the discharge and acquittal of the appellant respecting the charges in all the 7 cases. This order should not have been made. The learned trial Magistrate should have observed the various rules governing the taking of other offences into consideration such as inquiring of the consent of the accused, looking into the propriety or otherwise of taking the offences into consideration in sentencing and so forth, and then proceeded to sentencing according to law. Since there is no appeal by the prosecution and since the learned trial Magistrate obviously did not take into consideration the offences above mentioned in meting out the punishment now under appeal. I would leave the matter as it is and give no regard to them in dealing with the appeal.

Now, reverting to the present appeal:

In case (1), the offence committed is dishonestly retaining stolen property, to wit, a 14" "National" television set valued at about RM500 (s. 411 of the Penal Code). The appellant was sentenced to 5 years' imprisonment and a fine of RM3,000 in default 6 months' imprisonment.

In case (2), the offence committed is also of similar nature, that is dishonestly retaining a stolen 20" "Sharp" television set valued at about RM1,200 for which the appellant was sentenced to 5 years' imprisonment and a fine of RM5,000 in default 6 months' imprisonment.

In fact, the 2 offences in cases (1) and (2) were committed at the same time and place though the articles (television sets) involved belonged to different owners.

In case (3), the appellant was convicted of the theft of a television set, a video player and a CD mini compo (to a total value of RM3,280) in a building used as a human dwelling, an offence under s. 380 of the Penal Code. He was sentenced to 6 years' imprisonment and 5 strokes of the rotan.

In all the 3 cases, the items retained or stolen were recovered.

Generally speaking, fines may be added to other form of punishment in cases where offenders obtained profits so as to deprive them of the ill-gotten benefit. In cases (1) and (2), since the items retained were recovered and considerable custodial sentences were given, the fines, in my opinion, ought not to have been imposed. In other words, having sentenced the appellant to substantial periods of imprisonment and having regard to the fact that he himself had obtained no financial benefit from the offences, I am of the view that the fines imposed were inappropriate. *R. v. Forsythe* [1980] 2 Cr. App. R. (S) 15; *R. v. Jacobs* [1980] Crim. LR 800. The fines are set aside.

Further, since charges in cases (1) and (2) arose out of the same set of facts and from the same transaction, it is manifestly excessive to impose substantial penalties on both charges. In such circumstances, there should be only one substantial sentence while the other charge be given a lesser sentence. *DPP v. Stewart* [1983] 2 AC 91 PC.

As regards the imprisonment terms in cases (1) and (2), the 5 year imprisonment term is the maximum under s. 411 of the Penal Code. In principle, maximum penalty is intended for the worst possible case. Whilst it is true that the appellant has 6 previous convictions between 1968 to 1983, the offences took place some 6 to 7 years before the cases now under appeal.

In all the circumstances and having regard to the above principles, I would reduce the imprisonment term from 5 years to 3 years in case (1) and the imprisonment term from 5 years to 3 months in case (2).

As regards case (3), as there is no evidence of any use of actual physical violence, I would set aside the sentence of whipping. The imprisonment sentence of 6 years, however, is to stand. In this connection, I reject the plea of the appellant to set aside the custodial sentence and to increase the whipping instead.

In short, for case (1), the imprisonment sentence is reduced to 3 years. The fine of RM3,000 is set aside; for case (2), the imprisonment sentence is reduced to 3 months. The fine of RM5,000 is set aside; and for case (3), the imprisonment sentence of 6 years is to stand but the order of whipping is set aside. The imprisonment sentences in all the 3 cases are to run concurrently, and the periods the appellant had spent in the police custody and in the prison in default of payment of the fines, which I have set aside, are to be taken into account in computing the imprisonment sentences.

Of late, there have been increasing cases where both custodial sentences and fines were imposed for one and the same offence. As a general guideline, I would venture to state as follows:

1. The sentencing Court should consider whether imprisonment sentence is the appropriate form of punishment, regard being had to all the circumstances of the case including the nature and the gravity of the offence, and public interest.

2. If fine is an adequate punishment, then the sentences should impose a fine. Consideration should be given to the ability of the offender to pay the fine.

3. Fine may be added to a prison sentence as a means of removing the profit of the offender's offence. Here again, regard should be had to the offender's ability to pay because failure to pay would involve a further period of imprisonment of default. But if, on the material available, the sentencer is as sure as he or she can be that the offender can afford to meet the fine, the possibility of default should not cause the sentencer to reduce the principal prison term.

4. In a case where custodial sentence is imposed and forfeiture order is also made resulting in the offender obtaining no financial benefit from the offence committed, fine should not normally be imposed.

Also found at [1992] 3 CLJ 1408